

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 96 of 2002

in

SPECIAL CIVIL APPLICATION No 3081 of 2001

With

CIVIL APPLICATION NO. 581 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT
and
Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

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STATE OF GUJARAT

Versus

NARESHKUMAR SHASHIKANT PAREKH

Appearance:

Mr. L.R.Pujari, ASSTT. GOVERNMENT PLEADER
for Appellants.
MR BP GUPTA for the Respondent.

CORAM : MR.JUSTICE J.N.BHATT
and
MR.JUSTICE KUNDAN SINGH

Date of decision: 14/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE J.N.BHATT)

A short but interesting question which has come up for our consideration and adjudication in this Letters Patent Appeal by invoking clause 15 of the Letters Patent against the judgment of the learned Single Judge rendered on 6.9.2001 in writ petition no. 3081 of 2001 whereby the respondent-original petitioner succeeded in claiming his right for promotion as he was already included in the select list prepared for the purpose of promotion.

2. A few relevant and material skeleton projection of facts may be highlighted at the outset so as to appreciate merits and challenge against the appeal on hand.

3. The respondent is the original petitioner who joined as Inspector of Notified Factories in the Government of Gujarat on 1.5.1982. His name was also included in the select list by the Departmental Promotion Committee held, on 16.11.1999. The appellant State of Gujarat upon receipt of a complaint of bribe on 28.3.2001, against the respondent, the Vigilance Commission recommended for the initiation of the departmental proceedings, as well as, criminal prosecution. The appellant State therefore, took a conscious decision to initiate departmental, as well as, criminal proceedings against the respondent, on 31.3.2001. In the meantime, the persons who were senior to the respondent in the select list for the post of Junior Inspector of Factories, came to be promoted by the appellant by its order dated 4.7.2000. The respondent was due to be promoted on 11.4.2001, but on account of earlier conscious decision to initiate departmental proceedings as well as criminal prosecution taken on 31.3.2001, seven persons junior to the respondent came to be promoted and the promotion of the respondent was not released in view of the aforesaid decision as he was to be departmentally dealt with and he had to face criminal prosecution and charge of bribery. Obviously, therefore,

the respondent officer got agitated as his promotion was withheld and juniors were promoted.

4. The respondent-original petitioner therefore, initiated a legal battle by filing Special Civil Application no. 3081 of 2001 for the issuance of a writ of mandamus or any other appropriate writ, order or direction directing the appellants-original respondents to promote him to the post of Junior Inspector of Factories and give deemed date of promotion from the date on which the junior to the original petitioner came to be promoted. The learned Single Judge, after consideration of facts and circumstances directed the appellant-original respondent State of Gujarat for promotion by allowing the petition by order dated 6.9.2001 which is directly under challenge before us in this Letters Patent Appeal.

5. We have been taken through the entire record by the learned counsel appearing for the respondent and the learned Assistant Government Pleader in the course of marathon submissions on different dates. We have also carefully and dispassionately examined the context and texts of the impugned judgment of the learned Single Judge. We have also considered and scrutinised the factual profile emerging from the record of the present case. We have also enjoyed the pleasure of going through in meticulous details of the relevant rules and the latest applicable resolution of the Government of Gujarat, General Administration Department, dated 23rd September, 1981. It may be noted at this stage that strong reliance has been placed on para 2(iii) and para-7 of the said resolution on behalf of the appellant State of Gujarat. We have also given our anxious thoughts to the case laws relied on by either sides.

6. In the light of factual matrix of the case on hand and emerging from the record, para-2 of the resolution dated 23rd September, 1981 is important and material for evaluation of the sole question placed in focus before us in this Letters Patent Appeal which reads as under :

"2. The cases of Government servants who are facing departmental enquiries of whose conduct is under investigation could broadly be classified as under:

- (i) those who are under suspension; or
- (ii) those against whom disciplinary proceedings are proposed to be initiated

i.e. on the basis of a preliminary enquiry or otherwise a decision has been taken by the competent authority to initiate disciplinary proceedings against them, but where a charge sheet and the statement of allegations have not been issued."

7. In this context, we are, also, tempted to refer and consider the provisions incorporated in para-7 of the said resolution as strong reliance has been placed by, in course of submissions before us on behalf of the appellant, State of Gujarat. It will be, also, therefore, profitable to refer and quote the said para which also reads as under:

"7. A Government servant whose name is included in the select list but who is subsequently placed under suspension or against whom criminal proceedings/departmental proceedings have been initiated should not be promoted on the basis of his inclusion in the select list until he is completely exonerated of the charges against him. If the Government servant is completely exonerated of the charges, he will be promoted on the basis of his position in the select list, to the post which has been filled on a temporary basis pending disposal of the charges against him. If the exoneration is not complete, the question of his suitability for promotion will have to be adjudged afresh as mentioned in para-5 above."

8. The close scrutiny and upon serious evaluation of the aforesaid two provisions, makes it abundantly clear and without any shadow of doubt that a person who has already been found or selected and placed in the select list for the purpose of promotion, his promotion could be withheld by the Government in three contingencies which are enumerated hereinbelow.

- (i) If he is placed under suspension.
- (ii) If criminal proceedings have been initiated against him or
- (iii) Departmental proceedings have been initiated.

9. It becomes, therefore, very clear that mere inclusion of a name in the select list prepared for the purpose of promotion in the higher cadre "ipso facto", does not constitute absolute right upon an incumbent or an employee of the Government for the purpose of promotion as it could very well be visualised from the compound and conjoint reading of the aforesaid

two paragraphs of the resolution which we have quoted that in certain contingencies, such person, though selected and placed in the select list for the promotion, his promotion can be withheld and that is what precisely the appellant-original respondent State of Gujarat has done in the present case as before the release of the promotion on its due date. When the turn of the respondent-original petitioner came, a conscious decision was taken by the State of Gujarat, the appellant before us for commencement and initiation of departmental and criminal proceedings against him on the serious imputation of bribery which came to be generated on account of a complaint received against the original petitioner, on 3.2.2000, which was referred to the Vigilance Commission. After preliminary inquiry report was prepared on 9.3.2001 and the Vigilance Commission recommended institution of the departmental proceedings as well as criminal prosecution against original petitioner, on 28.3.2001. On the basis of the recommendations and advice of the Vigilance Commission, the appellant State of Gujarat had taken a conscious decision, on 31.3.2001 to initiate departmental action against the original petitioner respondent before us. The due date for the release of the promotion in case of the respondent-original petitioner was obviously on 11.4.2001 before which the decision had been taken. Obviously, therefore, the fact situation we have articulated and narrated from the record of the present case would attract the provisions of both the paragraphs quoted hereinbefore. In this set of circumstances, how could it be said for a moment that withholding of the promotion to the respondent-original petitioner before us though selected and found empanelled in the select list could be granted and that too, in a case where serious charge of bribery is under investigation after the recommendation of the Vigilance Commission of the State of Gujarat. With due respect, the learned Single Judge has taken a perception and has assigned reasons in support of the impugned judgment, are not, in our opinion, sustainable and, therefore, we are left with no alternative, but to make a departure and take a view that the ultimate conclusion recorded by the learned Single Judge is unsustainable and without proper evaluation and appreciation of the factual profile coupled with the legal settings.

10. Be it also noted that in a service jurisprudence, one of the basic and important facets and concepts has been, irrespective of any statutory or contractual provisions between master and the servant, a person though already placed in the select list and under

any departmental action, had been initiated at the time of holding and resultant decision of the departmental promotion committee, could not be promoted "ipso facto" or as a matter of right for the release and issuance of promotion or recruitment order. In a case like one on hand, when subsequently such an employed officer or incumbent is shrouded with clouds or has some clout and cloud which need to be investigated upon before the employment or promotion order is issued. Undoubtedly, this is a basic principle of service jurisprudence. It may happen in a given case that at the time of selection, even out of recruitment process, nothing has been found or spelt out against the incumbent or an individual whose selection is made for the purpose of recruitment and likewise even in the case of selection and resultant empanelment for the purpose of promotion to the higher cadre or post, but subsequent circumstances leading to a stage where the conduct or any act or omission of such a person needs to be investigated before, the actual release of the appointment order or promotion order, as the case may be, is passed, undoubtedly, it is always open for the management, master or employer to consider this aspect and he cannot be oblivious to the subsequent event, conduct or circumstances which puts incumbent or an employee or an officer in a shroud of clouds, more so, when it is a serious charge of bribery. This proposition is very well expounded and very well enunciated and, therefore, it would not detain us any further to divulge on this dimension of the service jurisprudence. Of course, this is highlighted even in a case where specifically such a provision is not found, whereas the present case stands on a higher footing where two provisions of the resolution referred hereinabove clearly provide a launching pad for initiation of departmental inquiry and/or prosecution on a charge or misconduct based on some inquiry or preliminary inquiry and resultant withholding of the promotion.

11. In the net result, the impugned judgment of the learned Single Judge deserves to be quashed and set aside and the original petition filed by the petitioner-respondent before us is required to be rejected without any order as to costs. Accordingly, the appeal shall stand allowed leaving parties to bear their costs.

(J.N.Bhatt,J)

(Kundan Singh,J)

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